



Chairperson: Bob Wyatt, NW Natural
Treasurer: Frederick Wolf, DBA, Legacy Site Services for Arkema

January 28, 2016

William E. Hall, Ph.D.
Acting Director, Conflict Prevention and Resolution Center
U.S. Environmental Protection Agency (MC: 2388A)
1200 Pennsylvania Ave, NW
Washington, DC 20460

Re: Request for CPRC Assistance With Respect to the Portland Harbor Superfund Site, Portland, Oregon (Lower Willamette River, Portland Harbor Superfund Site, USEPA Docket No: CERCLA-10-2001-0240)

Dear Mr. Hall:

The Lower Willamette Group (LWG) is a subset of the parties who have been identified as potentially responsible parties (PRPs) at the Portland Harbor Superfund Site in Portland, Oregon. Pursuant to a 2001 Administrative Order on Consent (Consent Order), the LWG is working with EPA Region 10 to complete a Remedial Investigation/Feasibility Study for the Site.

In a January 4, 2016 letter, EPA indicated its intent to take over and finalize the Feasibility Study (Enclosure A). The LWG disagrees with this decision and has invoked its dispute resolution rights under the Order (Enclosure B).

The LWG would very much like to resolve any disagreements with EPA and complete the RI/FS process in a mutually acceptable manner. We hope the dispute resolution process initiated under the Consent Order leads to a satisfactory resolution. Under the Consent Order, the LWG and EPA have 14 days to try to informally resolve the dispute. If that is not successful, Region 10 will decide the dispute.

Based on recent discussions between LWG senior managers and the Region 10 Regional Administrator, however, the LWG is concerned the Region has a predetermined view about how this dispute should be decided. We believe the assistance of a third party neutral provides the best chance of reaching an acceptable resolution. Indeed, in the notice of dispute we recently sent to Region 10, the LWG suggested the possibility of involving the Conflict Prevention and Resolution Center (CPRC) (see Enclosure B, page 13).

While the current dispute focuses on EPA's takeover of the Feasibility Study, the LWG and EPA have significant disagreements as to the remedy that should be implemented at this Site. As a result, we believe that if the CPRC assists the parties in achieving an acceptable outcome in the current dispute, it is possible that CPRC also could play a significant role in

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The Lower Willamette Group

cc:

Lori Cora, U.S. Environmental Protection Agency, Region 10
Kristine Koch, U.S. Environmental Protection Agency, Region 10
Sean Sheldrake, U.S. Environmental Protection Agency, Region 10
Confederated Tribes and Bands of the Yakama Nation
Confederated Tribes of the Grand Ronde Community of Oregon
Confederated Tribes of Siletz Indians of Oregon
Confederated Tribes of the Umatilla Indian Reservation
Confederated Tribes of the Warm Springs Reservation of Oregon
Nez Perce Tribe
Oregon Department of Fish & Wildlife
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Oregon Department of Environmental Quality
LWG Legal
LWG Repository



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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OFFICE OF
ENVIRONMENTAL
CLEANUP

JAN 04 2016

Mr. Bob Wyatt
Chairman, Lower Willamette Group
c/o Northwest Natural
220 Northwest Second Avenue
Portland, Oregon 97209

Re: Portland Harbor Superfund Site, Administrative Order on Consent for Remedial Investigation and Feasibility Study; Docket No. CERCLA-10-2001-0240; EPA Decision to Complete the Portland Harbor Superfund Site Feasibility Study

Dear Mr. Wyatt:

I am writing to inform you that the U.S. Environmental Protection Agency will finalize the Feasibility Study for the Portland Harbor Superfund Site and not require or direct the Lower Willamette Group to incorporate our modifications and produce the draft final Feasibility Study. By letter dated, December 18, 2012, the EPA notified the LWG that we did not approve its March 2012 draft FS, and listed key deficiencies. After the disapproval notice, we agreed to coordinate our proposed modifications section by section with the LWG, as documented in the Portland Harbor Superfund Site Revision Process for Feasibility Study, modified December 15, 2014. In accordance with the agreed process, the EPA shared Sections 1 and 2 on July 8, 2014, and February 23, 2015, and the LWG and EPA discussed the LWG's comments on those sections. We provided Section 3 on July 29, 2015 and Section 4 on August 7, 2015. Since release of those sections, the LWG has met to talk through the Decision Trees on November 2, 2015, and December 3, 2015, and the LWG has provided extensive comments on those sections. The EPA is considering the LWG's comments and will make appropriate changes in the revised final FS. The LWG provided the National Remedy Review Board and Contaminated Sediments Technical Advisory Group (NRRB and CSTAG) with comments and concerns on the FS and direction of the cleanup for Portland Harbor. The Region is also considering those comments in revising the FS.

To keep the remedy selection process moving forward and publish a Proposed Plan by March 2016, the EPA decided to complete the Feasibility Study rather than direct the LWG to incorporate our changes and produce the report. EPA can complete the work otherwise required of the LWG under the Administrative Settlement Agreement and Order on Consent (AOC) because the 2012 draft FS was disapproved as deficient. See Section IX, Paragraph 1 and Section XIX, Paragraph 9. Furthermore, EPA can more effectively and efficiently incorporate changes to the FS to address stakeholder comments, the NRRB and CSTAG recommendations, and any issues raised during government to government consultations with Tribal governments.

Given the EPA's decision, we expect the LWG has questions about the status of its remaining work under the AOC, and dispute resolution rights. Work remains to be done under the AOC. The LWG must finalize the Remedial Investigation Report (RI).

The EPA will soon provide its last comments on the RI and request the LWG to incorporate our last changes. We too may seek the LWG's assistance in providing information for the administrative record. Additionally, until we seek public comment and finalize the Administrative Record, the EPA will not know that we have "all appropriate necessary information for the RI/FS for a CERCLA Record of Decision." See Section IV, Paragraph 2. If new information is raised by public comments that EPA decides requires supplemental RI or FS work, we may ask the LWG to conduct that work. Although the EPA doesn't expect this to happen, the AOC will remain open and effective in order to cover that possibility. See generally, Section XXXVIII, Termination and Satisfaction. Additionally, not all of EPA's response costs have been billed and reimbursed under the AOC.

Regarding dispute resolution, the EPA notified the LWG in December 2012 that it disapproved the LWG's 2012 draft and would be modifying it. The opportunity to dispute EPA's disapproval of the 2012 draft has technically passed; however, given EPA is now deciding to finalize the FS rather than simply modify it, the EPA believes it is reasonable that, in accordance with Section XIX of the AOC, the LWG have the opportunity, if it chooses, to dispute EPA's decision to disapprove the LWG's 2012 draft. Additionally, the dispute resolution provision arguably does not apply to the EPA's FS modifications because we are not requiring the LWG to incorporate them and produce the FS. See Section XIX, Paragraph 1, and Section XVIII, Paragraph 1. However, we will provide the LWG an opportunity to raise a dispute on the August 2015 modified FS so we can consider the LWG's issues in producing the final FS.

Therefore, in accordance with Section XIX, Paragraph 1, within 14 days of receipt of this notice, the LWG may, if it chooses, invoke dispute resolution on: (1) EPA's disapproval of its 2012 draft FS; and/or (2) EPA's August 2015 modified FS by notifying the EPA Project Manager, Kristine Koch, in writing of their objections. The LWG's written objections shall define the dispute, and state the basis of its objections. For an additional 14 days, the EPA and the LWG have an opportunity to resolve the disputed issues. If the LWG's disputed issues are not resolved within the 14-day informal resolution timeframe, the LWG may request a final determination by the EPA.

The EPA hopes the LWG is as pleased as we are that the project is close to the remedy selection phase and is moving toward actual cleanup after 15 years. The EPA understands that there are a number of issues raised in this letter. We would be happy to discuss any questions you have about our decision. Please contact Debbie Robinson at (206) 553-4961 or Robinson.Deborah@epa.gov to set up a meeting or conference call.

Sincerely,



Cami Grandinetti
Program Manager
Remedial Cleanup Program



Chairperson: Bob Wyatt, NW Natural
Treasurer: Frederick Wolf, DBA, Legacy Site Services for Arkema

January 19, 2016

Kristine Koch
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900, M/S ECL-115
Seattle, WA 98101-3140

**Re: Request for Dispute Resolution on EPA January 4, 2016 Decision to Take Over
Portland Harbor Feasibility Study (Lower Willamette River, Portland Harbor Superfund
Site, USEPA Docket No: CERCLA-10-2001-0240)**

Kristine:

The Lower Willamette Group (LWG) is in receipt of the United States Environmental Protection Agency, Region 10 (EPA) letter dated January 4, 2016. Pursuant to Section XVIII of the above-captioned 2001 Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study (Consent Order), the LWG hereby invokes the dispute resolution process. The LWG objects to EPA's January 4, 2016 decision to take over the Portland Harbor Feasibility Study and requests formal dispute resolution for the reasons described in this letter.

The LWG requests that EPA withdraw the January 4, 2016 letter. The LWG continues to be willing to work with EPA to assist EPA in meeting its schedule for the FS, Proposed Plan and Record of Decision (ROD). However, we are unable to accept a determination by EPA that the LWG is not in compliance with the Consent Order, and we are unable to accept the abrogation of our dispute resolution rights. We request a meeting with EPA leadership as soon as possible to continue our discussions about how we might resolve this matter.

Background

The LWG submitted its draft Feasibility Study (FS) to EPA on March 30, 2012. The draft FS was prepared in accordance with the Consent Order and the EPA-approved 2004 RI/FS Programmatic Work Plan. Shortly after the LWG submitted the draft FS report, EPA released a fact sheet stating that it would "use the Feasibility Study to help prepare a plan to clean up Portland Harbor."¹ In April and May of 2012, EPA and the LWG jointly conducted a series of community information sessions to present the alternatives evaluated in the draft FS to the public.

On December 18, 2012, EPA advised the LWG that "[a]t this time ... the draft FS is not adequate for its intended purpose and is not approved by EPA." EPA's December 18, 2012 letter stated that

¹ EPA fact sheet, *Learn More About the Portland Harbor Superfund Site Cleanup* (April 2012), attached at Tab 1.
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EPA intends to work cooperatively with the LWG in completing the FS and expects that revisions to the FS by both parties will be shared for review and comment as they are developed in order to proceed in an iterative manner.

EPA will only be providing detailed comments on the portions of the draft FS that we will require the LWG to revise or perform more analysis. General areas of concern on the draft FS are therefore noted in this letter and the attached comments, but specific requests to LWG will be provided under separate cover throughout the revision process. In keeping with the shared goal of completing this document in a timely manner, we will work with the LWG to develop a process and schedule for revising this document that targets November 2013 as a completion date for the FS.

We look forward to working with the LWG on revisions to the document that will be needed to support EPA's proposed cleanup plan for the Portland Harbor Site. We would be happy to meet with the LWG's project managers in the near future to discuss EPA's process for completing the draft FS, including next steps and our vision for completing the work.²

After the LWG received EPA's letter, Jim McKenna, the LWG's lead consultant, contacted Chip Humphrey, one of EPA's project managers at the time, and specifically asked whether EPA's December 18, 2012 letter was intended to trigger a deadline for the LWG to initiate dispute resolution under the AOC. Mr. Humphrey assured Mr. McKenna that it did not and stated that he had purposely drafted the letter to convey EPA's initial concerns about the draft FS without specifically asking the LWG to do anything at that time beyond meeting with EPA to discuss the process to complete the FS.³ Mr. Humphrey stated that EPA would work with the LWG to develop a process for the FS that mirrored the parties' process for completing the Remedial Investigation, including deferring dispute resolution until the end of the FS process.⁴

The fact that EPA did not approve the LWG's first draft of the FS report was not a surprise to the LWG. Indeed, the Consent Order contemplates revisions to the draft FS report:

If EPA disapproves or requires revisions to the draft FS report, in whole or in part, Respondents shall amend and submit a revised FS report to EPA which is responsive to the directions in all EPA comments, within thirty (30) days of receiving EPA's comments.

Consent Order, §VII.4.H.ii. Nearly every RI/FS order provides for the same submittal-comment-resubmittal process.⁵ Based upon EPA's Dec. 18, 2012 letter, Mr. Humphrey's assurances to Mr. McKenna, and the terms of the Consent Order itself, the LWG met with EPA throughout 2013 and the first half of 2014, providing technical information to EPA on a jointly compiled list of key FS issues.

² Humphrey and Koch letter to Wyatt dated December 18, 2012, attached at Tab 2.

³ McKenna Declaration, attached at Tab 3.

⁴ *Id.*

⁵ See EPA's Model Administrative Order on Consent for Remedial Investigation/Feasibility Study, January 21, 2004, Section X (<http://www.epa.gov/sites/production/files/2013-10/documents/rev-aoc-rifs-mod-04-mem.pdf>).

Meanwhile, EPA and LWG senior and project managers negotiated a detailed agreement for the process to finalize the FS.⁶ The *Revision Process for Feasibility Study* (the FS Process Agreement), adopted June 11, 2014 and amended December 15, 2014,⁷ provides that EPA and the LWG would meet and attempt to resolve technical issues, “seeking consensus.” Following these discussions, EPA would “consider LWG positions and decide how to move forward with FS revisions.” The FS Process Agreement clarified that

Any technical discussions or decisions are non-binding on either party, and any materials provided to the LWG in connection with these discussions do not constitute EPA comments, modifications or direction for change that must be addressed by the LWG under Section IX of the AOC.⁸

Under the FS Process Agreement, EPA drafted the main text for each section and provided it to the LWG for review and comment. EPA committed to “provide a written response to LWG comments as to whether they are incorporated or rejected for each section,” and then EPA and the LWG would attempt to informally resolve the LWG’s comments. EPA would then “share a copy of the proposed final version with the LWG after considering the LWG’s comments, but the EPA is not planning to direct the LWG to incorporate these modifications at this point in the process” (emphasis added).⁹

The original June 11, 2014 FS Process Agreement provided the LWG a dispute resolution opportunity as EPA finished each section.¹⁰ The LWG preferred this approach, because it allowed issues that carried forward through the FS analysis to be resolved sequentially as the FS was developed. By the fall of 2014, however, EPA was concerned enough about meeting the schedule it had set for completion

⁶ The FS Process Agreement grew out of a similar agreement for finalization of the RI negotiated between EPA and LWG senior managers developed in the wake of the LWG’s dispute over EPA’s 2012 notice of noncompliance concerning the Baseline Human Health Risk Assessment. See, Cohen letter to Kirkpatrick dated September 24, 2013, attached at Tab 4. In his partial resolution of the dispute concerning the BHHRA, Director Opalski wrote, “It is ... reasonable and appropriate for EPA and the Lower Willamette Group to seek to clarify expectations and/or protocols for communications between them going forward.” Opalski October 25, 2012 Partial Resolution of Dispute, attached at Tab 5. In 2013, Director Albright noted the success of the RI Process Agreement in moving the RI/FS toward completion: “I find it interesting that the language relating to ‘good faith’ is specifically called out in this AOC. Such a provision in an AOC is highly unusual, and as such must have been put in for a specific purpose. Since the EPA sent its notice of stipulated penalties, a number of actions have been taken to demonstrate ‘good faith’ and improve working relationships. Among the steps taken were development and establishment of a new process for the remaining sections of the RI report. Early implementation of this new process appears to be successful in moving work forward I find that the LWG’s efforts to engage in this new process ... are a demonstration of ‘good faith.’ I understand that the staff representing the LWG and the EPA have made significant progress on several fronts.” Albright September 30, 2013 Resolution of Dispute, attached at Tab 6.

⁷ The June 11, 2014 FS Process Agreement is attached at Tab 7. The December 14, 2014 modification is attached at Tab 8. EPA subsequently further modified the process and schedule by delivering Sections 3 and 4 for review at approximately the same time. Cohen e-mail to Kirkpatrick and Hamilton dated April 7, 2015, attached at Tab 9. Other than this schedule modification, however, the parties continued to follow the FS Process Agreement. See, e.g., Koch e-mail to Wyatt and McKenna dated August 18, 2015, attached at Tab 10 (“per the agreed process, any issues raised during the 30 day review period are to be resolved within the subsequent 14-day period”). Similarly, Administrator McLerran referred to the LWG’s right to dispute resolution during a November 13, 2015 executives meeting.

⁸ December 14, 2014 FS Process Agreement at p. 1.

⁹ *Id.*

¹⁰ See also, June 5, 2014 Cora email to Pearman, attached at Tab 11.

of the FS that it proposed to modify the FS Process Agreement to eliminate the section-by-section dispute resolution process in favor of a single opportunity to dispute all FS issues when EPA finished the FS.¹¹ Reluctantly, the LWG agreed to this approach in order to support EPA's desired schedule. Therefore, the December 14, 2014 modified FS Process Agreement provides a clear opportunity for the LWG to dispute the final FS once EPA completed its review of and directed changes to all sections of EPA's revised FS report:

At the conclusion of the technical discussion process for all sections and within 120 days following NRRB review, EPA will send a formal letter with its final text modifications, and additional work requirements for revision to supporting tables, maps, and figures for all sections and direct the LWG to incorporate the text and perform the requested revision work for the draft Final FS. Per the AOC, the LWG shall proceed on the direction, unless within fourteen (14) days of receipt of the EPA letter, the LWG invokes dispute resolution by identifying their objections as set forth in the AOC.¹²

On July 8, 2014, consistent with the FS Process Agreement, EPA provided its first detailed comments on the 2012 draft FS to the LWG by providing a new FS Section 1. EPA's cover letter notes, "[w]e appreciate your willingness to work with us to complete this report and move forward to cleanup of the Portland Harbor Superfund site."¹³ The LWG provided its comments on Section 1, and, on December 18, 2014, EPA provided a revised Section 1, stating, "we look forward to completing the remaining sections of the FS with you."¹⁴ EPA provided drafts of Section 2 of the FS on February 23, 2015, Section 3 on July 29, 2015, and Section 4 on August 18, 2015. The LWG provided its comments on each section within the timeframes set out in the FS Process Agreement. Although EPA responded to the LWG's comments on Section 2 and provided several revised drafts of Section 2 and associated tables, figures and appendices, EPA has never responded to the LWG's comments on Sections 3 and 4 of its 2015 draft FS, has never provided revised drafts of Sections 3 or 4, and has never provided the LWG with its comments and directions for changes to the FS.

The LWG has consistently complied in good faith with the FS Process Agreement, has provided technical information requested by EPA during EPA's revision of the FS quickly and without objection, and has in good faith accepted deferred dispute resolution under the Consent Order and the FS Process Agreement to support EPA in its desired schedule for completing the FS. The LWG stands ready and willing to perform its obligation to incorporate EPA's final text modifications and additional requested revisions to the FS. EPA has never suggested that the LWG has in any way deviated from its commitments under the FS Process Agreement. As recently as November 13, 2015, Administrator McLerran met with elected officials and executives from the City of Portland, the Port of Portland, and NW Natural without mentioning that EPA intended to take over the FS.

EPA's January 4, 2016 letter requiring the LWG to relinquish the FS and its negotiated dispute resolution rights for the first time makes the allegation that the LWG failed to comply with the Consent Order with respect to the FS submitted in 2012.¹⁵ The January 4 letter is an extraordinarily unfair and

¹¹ See Cohen e-mail to Kirkpatrick et al dated November 26, 2014, attached at Tab 12.

¹² FS Process Agreement, pp. 1-2.

¹³ Koch letter to Wyatt dated July 8, 2014, attached at Tab 13.

¹⁴ Koch e-mail to Wyatt and McKenna dated December 18, 2014, attached at Tab 14.

¹⁵ During the afternoon of Monday, December 28, 2015, EPA requested a January 4, 2016 conference call with the AOC signatories (including attorneys, who are typically not permitted to participate in EPA meetings and conference calls) "to discuss the process to complete the Portland Harbor Feasibility Study." See, Robinson e-mail

punitive act against the small subset of potentially responsible parties who have worked hardest to assist EPA in its efforts toward a cleanup of the Portland Harbor Superfund Site. This action is unsupported by any authority in the Consent Order, EPA's attempt to revoke important contract rights at the last moment stands to make it that much more difficult for potentially responsible parties to see value in cooperating with EPA on the far larger remedy implementation effort ahead.

Request for Dispute Resolution

For these reasons, and as discussed more fully below, the LWG respectfully objects to EPA's January 4, 2016 decision to take over the Portland Harbor Feasibility Study and requests formal dispute resolution on the following bases:

1. EPA lacks the grounds under Section IX, Paragraph 1 or Section XIX, Paragraph 9 of the Consent Order to require the LWG to relinquish performance of work as stated in the January 4, 2016 letter.
2. The January 4, 2016 letter amounts to a requirement that the LWG waive its rights under the Consent Order and the FS Process Agreement to dispute the final FS.
3. To the extent that it is relevant to EPA's final FS, the findings and conclusions of EPA's 2015 draft FS are technically incorrect, unsupported by facts in the administrative record, and insufficient to support remedy selection by EPA.
4. To the extent that it is relevant to EPA's final FS, the comments provided in EPA's December 2012 letter concerning the LWG draft FS report are incomplete, technically incorrect and, in at least some cases, reflect positions that EPA itself has abandoned in its 2015 FS drafts. The December 2012 letter was not a disapproval, and nothing in the December 2012 letter supports EPA's determination more than three years later that the LWG has failed to comply with the Consent Order.
5. EPA's unilateral work takeover without cause and denial of the LWG's right to initiate dispute resolution on the final FS under Section XVIII constitute a material breach of the Consent Order.

The LWG requests that EPA withdraw the January 4, 2016 letter. The LWG continues to be willing to work with EPA to assist EPA in meeting its desired schedule for the FS, Proposed Plan and ROD. However, we are unable to accept a determination by EPA that the LWG is not in compliance with the Consent Order, and we are unable to accept the abrogation of our dispute resolution rights.

1. EPA lacks grounds under the Consent Order for a work takeover.

EPA's January 4, 2016 letter states

to Woronets dated December 29, 2015, attached at Tab 15. Later that day, EPA notified the LWG that it needed further internal meetings before it could confirm the January 4 meeting it had requested. On Tuesday, December 29, EPA confirmed the conference call with the AOC signatories for 3 p.m. on January 4. The January 4 conference call was the first notice the LWG had that EPA intended the work takeover; its letter was delivered by email at 4:59 p.m. the same day, shortly after completion of the 3 p.m. conference call.

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EPA can complete the work otherwise required of the LWG under the [Consent Order] because the 2012 draft FS was disapproved as deficient. See Section IX, Paragraph 1 and Section XIX, Paragraph 9.¹⁶

EPA's requirement that the LWG relinquish completion of the FS is not supported by either cited provision of the Consent Order.¹⁷

Section IX, Paragraph 1 does not address a work take over at all. Instead, it requires the Respondents to incorporate EPA's comments in revised deliverables.

At EPA's discretion, Respondents must fully correct all deficiencies and incorporate all information and comments supplied by EPA either in subsequent or resubmitted deliverables within a time frame specified by EPA.

As discussed above, EPA has never provided its comments and directions for change for the final FS to the LWG. The FS Process Agreement clearly states that "any materials provided to the LWG in connection with" technical discussions prior to EPA's final direction to the LWG to produce the FS "do not constitute EPA comments, modifications or direction for change that must be addressed by the LWG under Section IX of the AOC."¹⁸

Section IX, Paragraph 4 does address takeover of a deliverable:

If Respondents amend or revise a report, plan or other submittal in response to EPA comments, and EPA subsequently disapproves of the revised submittal, or if such subsequent submittals do not fully reflect EPA's directions for changes, EPA retains the right to seek penalties, perform its own studies, complete the RI/FS (or any portion of the RI/FS)....

Those facts don't exist here, and EPA doesn't claim that they do. The LWG has not submitted an amended or revised FS Report that fails to "fully reflect EPA's directions for changes" – because EPA has not provided its directions for changes to the LWG.

Section XIX, Paragraph 9 also describes a situation in which EPA can take over all or part of the work:

The stipulated penalties provisions do not preclude EPA from pursuing any other remedies or sanctions which are available to EPA because of Respondents' failure to comply with this Consent Order, including, but not limited to conduct all or part of the RI/FS by EPA.

EPA's statement that it is taking over the work "because the 2012 draft FS was disapproved as deficient" apparently is intended as a finding that the LWG has in 2016 failed to comply with the Consent Order because in 2012 EPA did not approve its first draft of the FS. The Consent Order itself is, however, quite clear that if EPA declines to approve the first draft of the FS, the

¹⁶ Grandinetti January 4, 2016 letter to Wyatt, attached at Tab 16.

¹⁷ We have not located any other provision in the Consent Order that would allow EPA to take over this work; we assume EPA's letter provides all of the grounds on which it intends to rely for its decision.

¹⁸ FS Process Agreement (December 15, 2014), Tab 8, at p. 1.

LWG's obligation is to "amend and submit a revised FS report to EPA which is responsive to the directions in all EPA comments, within thirty (30) days of receiving EPA's comments." It is a generally accepted principle of contract interpretation that terms of a contract that directly address a particular matter, control over more general language. *See, e.g., Feibusch v. Integrated Device Tech., Inc. Employee Benefit Plan*, 463 F.3d 880, 885-86 (9th Cir. 2006). The LWG stands ready and willing to submit a revised FS report that is responsive to the directions in all EPA comments within thirty days of receiving those comments. EPA's decision not to approve the 2012 draft FS cannot serve as a basis for EPA finding that the LWG has failed to comply with the Consent Order, when EPA has never provided the LWG with its comments for incorporation into a revised report.

In sum, EPA does not have grounds to take over the FS from the LWG because it has never provided the LWG with its comments on and directions for changes to the FS, and the LWG cannot therefore be in default of its obligation to incorporate those comments and directions for change into a revised report.¹⁹

2. The January 4, 2016 letter amounts to a requirement that the LWG waive its rights under the Consent Order and the FS Process Agreement to dispute the final FS.

The FS Process Agreement was developed and agreed upon by EPA and LWG Senior Managers as a part of a process "consistent with the [Consent Order]" that explained in the specific context of the FS revision process "when EPA modifications, comments and directions for changes to the LWG will occur . . . and when the RI/FS [Consent Order] dispute process may be invoked."²⁰ The December 2014 revision to the FS Process Agreement described the way in which the LWG's right under the Consent Order to dispute the FS could be exercised:

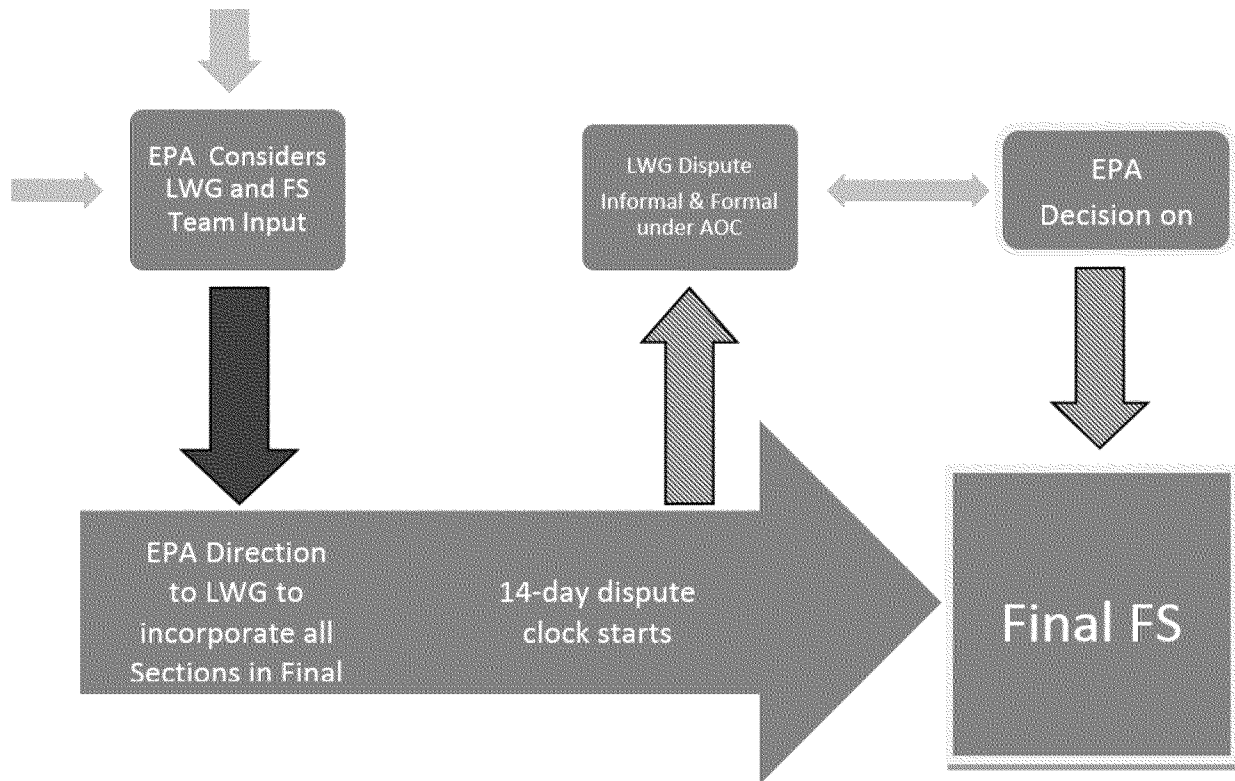
At the conclusion of the technical discussion process for all sections and within 120 days following NRRB review, EPA will send a formal letter with its final text modifications, and additional work requirements for revision . . . and direct the LWG to incorporate the text and perform the requested revision work for the draft Final FS. Per the [Consent Order], the LWG shall proceed on the direction, unless within fourteen (14) days of receipt of the EPA letter, the LWG invokes dispute resolution by identifying their objections as set forth in the [Consent Order].²¹

The accompanying FS Revision Process diagram clearly set forth the agreed-upon process by which the LWG could dispute the final FS:

¹⁹ We observe that work takeover is such an extraordinarily punitive remedy that it is not even mentioned in the EPA guidance *Options for Responding to Deficient Deliverables from PRPs* (OECA, June 30, 2011) (attached at Tab 17).

²⁰ FS Process Agreement (December 15, 2014), Tab 8, at p. 1.

²¹ *Id.*, pp. 1-2.



Thus, it is clear that EPA and the LWG agreed that the LWG did not waive its right under the Consent Order to dispute the final FS by conceding to EPA's proposed expedited FS revision process.

EPA's January 4, 2016 letter, however, purports to unilaterally change the FS revision process in a way that deprives the LWG of the dispute rights it holds under Consent Order, rights that were carefully preserved and defined in the FS Process Agreement. First, as described above, without any authority under the Consent Order, EPA purports to take over completion of the FS. Then, it directs the LWG that it can only exercise its right to dispute the FS with respect to the 2012 draft FS and the "August 2015 modified FS," not with respect to the Final FS. Together these amount to a requirement that the LWG waive its rights to dispute the Final FS. The LWG did not in the past and does not now consent to waive that right.

3. To the extent that it is relevant to EPA's final FS, the findings and conclusions of EPA's 2015 draft FS are technically incorrect, unsupported by facts in the administrative record, and insufficient to support remedy selection by EPA.

EPA's January 4, 2016 letter purports to limit the LWG's right to initiate dispute resolution to EPA's disapproval of the 2012 LWG draft FS and to EPA's August 2015²² draft FS. We have been advised

²² EPA's January 4, 2016 letter refers to "EPA's August 2015 modified FS." In fact, only a draft of Section 4 was delivered to the LWG in August 2015. In this letter, the terms "August 2015 draft FS" and "2015 draft FS" refer to all of EPA's draft sections of an FS for Portland Harbor. The LWG has never received a compiled "modified" or final FS report from EPA.

by EPA that it is significantly modifying the 2015 draft FS, and so EPA's offer to allow us an almost certainly futile dispute over a stale document that was never understood by either party to be a final draft seems pointless. Nonetheless, because EPA has never responded to our comments on key sections of the FS, and to avoid any later claim by EPA or others that we have failed to exhaust an administrative remedy, we are initiating dispute resolution on the findings and conclusions of the August 2015 draft FS, without waiving our right to dispute any final FS produced by EPA. As more fully explained in the LWG's previously submitted comments on the 2015 draft FS and to the National Remedy Review Board (NRRB), which we hereby incorporate by reference, the findings and conclusions of the August 2015 draft FS are technically incorrect, unsupported by facts in the administrative record, and insufficient to support remedy selection by EPA.²³

Our major technical disagreements with the FS are summarized in Attachment A to this Request for Formal Dispute.

As this summary demonstrates, and as explained at length in its comments on EPA's draft FS and its comments submitted NRRB, the LWG has identified many significant concerns with EPA's draft FS. The concerns are not trivial and relate directly to the viability of EPA's alternatives as legitimate cleanup options under CERCLA and the National Contingency Plan (NCP). The LWG intends to pursue all appropriate means to seek an informed and objective adjudication of its concerns.

Thus, the LWG will not waive or accept the unilateral dismantling of its rights under the Consent Order to object to EPA's use of cleanup levels that are not attainable within a reasonable time frame by a sediment remedy. Similarly, the LWG will not acquiesce to a decision-making process that fails to employ risk management to identify and prioritize the most significant and pervasive risks at the site and emphasizes mass removal over risk reduction. The LWG will not accept an evaluation of cleanup alternatives that offers no credible comparison of the tradeoffs in cost, time, and effectiveness between the alternatives. Because of EPA's failure to comply with previous agreements on finalization of the FS, the LWG has no choice but to invoke dispute resolution at this time regarding the lengthy list of concerns it has previously identified on EPA's FS.

EPA should understand the seriousness of the LWG's discontent. EPA has broad authority under CERCLA to select and require performance of remedies that protect human health and the environment. But EPA's authority is not limitless and is bounded by clear and direct requirements under CERCLA and the NCP. EPA's failure at Portland Harbor to comply with these requirements undermines its ability and authority to work with PRPs to perform a technically sound and effective cleanup.

4. To the extent that it remains relevant, the comments provided in EPA's December 2012 letter concerning the LWG draft FS report are incomplete and technically incorrect.

EPA's December 2012 letter identified several general areas of disagreement with the LWG's 2012 draft FS. To the extent that EPA's comments present sufficient detail for us to respond to them,²⁴

²³ The LWG's comments on the August 2015 draft FS are attached at Tab 18. The LWG's September 8, 2015 list of significant issues on Sections 3 and 4 of the August 2015 draft FS are attached at Tab 19. The LWG's October 19, 2015 comments to the National Remedy Review Board are attached at Tab 20.

²⁴ For example, EPA's comment on "text, figures and presentation" notes, "Please note that our lack of detailed comments on the text and figures in this initial comment set should not be construed to imply that we are in

we continue to disagree with EPA's approach to most of the topics discussed in the letter. Our detailed objections to EPA's approach to fate and transport modeling and MNR, principal threat waste, relevant exposure areas, the long and short term effectiveness and impact of dredging, and methodology for the comparative analysis of alternatives are contained within our discussion of EPA's 2015 draft FS,²⁵ and we will not repeat them here.²⁶

We do note that EPA itself no longer holds some of the views expressed in the December 18, 2012 letter. For example, in its 2015 draft FS, EPA itself was unable to successfully resolve issues surrounding fate and transport modeling and MNR that it raised in December 2012; rather than relying on the model referenced in the December 2012 letter or any other approach to predictive modeling of natural recovery, EPA ultimately abandoned all efforts to quantitatively evaluate long-term effectiveness or natural recovery.²⁷

Similarly, despite criticizing the 2012 LWG FS for its approach to identifying "Hot Spots" under Oregon law,²⁸ EPA did not identify any such "Hot Spots" in its 2015 draft FS, nor did it classify Oregon regulatory provisions pertaining to Hot Spots as ARARs.²⁹ Materials presented by Oregon Department of Environmental Quality confirm that "Hot Spots are not an ARAR."³⁰

Finally, EPA's December 18, 2012 letter was not a "disapproval." As stated in the letter, EPA believed the FS required revisions and was simply not approving the FS "at this time."³¹ As noted above, EPA's project manager advised the LWG that the notice was specifically drafted to avoid triggering the LWG's obligation to initiate dispute resolution.³² EPA's project manager stated that these were EPA's initial concerns and expressed its expectation that EPA would at some point direct the LWG to make specific changes to the FS.³³

5. EPA's unilateral work takeover without cause and denial of the LWG's right to initiate dispute resolution on the final FS under Section XVIII constitutes a material breach of the Consent Order.

Because EPA plainly lacks any basis under the Consent Order for taking over the FS, EPA's January 4, 2016 letter essentially repudiates material terms of its administrative settlement agreement

agreement with the text. EPA expects to work with LWG to revise figures and text in the document to correct these problems."

²⁵ See Section 3, *supra*, and Tabs 18, 19 and 20.

²⁶ The LWG also objects to the statement in EPA's January 4, 2016 letter that "the opportunity to dispute EPA's disapproval of the 2012 draft has technically passed." As discussed above, neither EPA nor the LWG ever contemplated that the LWG's *first draft* of the FS report would be approved without comment. The letter itself simply states that the report needs revision and "at this time ... is not approved by EPA." The letter not only did not require the LWG to do anything beyond meet with EPA, it was intentionally drafted by EPA to avoid the need for the LWG to initiate dispute resolution, and EPA assured the LWG that its comments did not trigger a deadline for initiating a dispute. McKenna Declaration, Tab 3.

²⁷ August 2015 Draft FS, p. 4-3 to 4-5.

²⁸ (ORS 465.315(2)(b)(A) and OAR 340-122-0115(32)(b))

²⁹ OAR 340-122-0115(32)(b) is not mentioned in Draft Final Tables 2.1-1 to 2.3-1 of the August 2015 draft FS.

³⁰ Parrett Presentation, 2014 Oregon Environmental Cleanup Conference, September 12, 2014, Slide 17, attached at Tab 21.

³¹ December 18, 2012 letter, Tab 2.

³² McKenna declaration, Tab 3.

³³ *Id.*

and order on consent with the LWG, including the LWG's rights under the Consent Order to invoke dispute resolution on the final FS. The LWG's contract rights are separate and apart from the LWG's rights under CERCLA, and the LWG expects the United States to honor its obligations under the Consent Order as it should any other contract.

Settlement agreements, consent decrees, and other negotiated administrative orders between private parties and the government are treated by federal courts as enforceable contracts.³⁴ Such documents are compromises in which parties "give up something they might have won in litigation."³⁵ As such, "enforceability of these compromise agreements is favored in the law."³⁶ Judicial approval of a settlement agreement or consent order is not a prerequisite to enforceability.³⁷ By its express terms, the Agreement is legally binding on EPA:

This Consent Order shall apply to and be binding on EPA, and shall be binding upon Respondents, their agents, successors, assigns, officers, directors, and principals The signatories to this Consent Order certify that they are authorized to execute and legally bind the parties they represent to this Consent Order.³⁸

Agreements to settle legal disputes "should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation."³⁹ A settlement agreement or consent order must be interpreted "as it is written."⁴⁰ When interpreting and enforcing such agreements, federal courts apply state contract law from the situs of the agreement.⁴¹ Courts construe such agreements according to their four corners, "and not by reference to any purposes of the parties or of the underlying statutes."⁴²

The interpretation and enforceability of EPA's agreements has often been addressed in the context of CERCLA.⁴³ In *US v. Knote*,⁴⁴ the court applied this principle to require EPA to comply with dispute resolution provisions of a consent decree:

The EPA's toxic waste clean-up efforts are commendable, however, its vigorous protection of the environment does not make it an administrative deity. Congress intended CERCLA to provide the EPA with the means to respond quickly to any release or threatened release of hazardous waste products. It did not intend to give the EPA unfettered authority to deceive and bully people into submission. It is with guarded

³⁴ *E.g., United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236-37 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *United States v. Asarco, Inc.*, 430 F.3d 972, 980-81 (9th Cir. 2005).

³⁵ *ITT Cont'l*, 420 U.S. at 235.

³⁶ *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989).

³⁷ *Collins v. Thompson*, 679 F.2d 168, 172-73 (9th Cir. 1982).

³⁸ Consent Order, §III.1.

³⁹ *ITT Cont'l*, 420 U.S. at 236-37.

⁴⁰ *Id.* at 236, quoting *Armour*, 402 U.S. at 682.

⁴¹ *Jones v. McDaniel*, 717 F.3d 1062, 1067 (9th Cir. 2013); *see also Collins*, 679 F.2d at 170-71.

⁴² *ITT Cont'l*, 420 U.S. at 233 (internal quotation marks omitted).

⁴³ *See, e.g., Asarco*, 430 F.3d 972, 980-81 ("Without question courts treat consent decrees as contracts for enforcement purposes"); *see also U.S. v. Charter Int'l Oil Co.*, 83 F.3d 510, 516-17 (1st Cir. 1996); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 769 (7th Cir. 1994) (Dispute regarding scope of consent decree "is first and foremost one of contractual interpretation"); *NJ Dep't of Env'tl. Prot. v. Gloucester Env'tl. Mgmt. Servs., Inc.*, 264 F. Supp. 2d 165, 175 (D. N.J. 2003); *U.S. v. Atlas Minerals and Chems., Inc.*, 851 F. Supp. 639, 651 (E.D. Pa. 1994).

⁴⁴ 818 F. Supp. 1280 (E.D. Mo. 1993), affirmed, 29 F.3d. 1297 (8th Cir. 1994)

hope that this is not the situation that is presently unfolding before the Court. The Court would rather believe that the EPA negotiated the Consent Decree in good faith; that it did not deliberately deceive the defendants into signing the Consent Decree with assurances that the formulation building would be decontaminated and not demolished; that it fully intended to abide by Section XIII's dispute resolution procedures, and that it accepted and concurred with the Court's continuing jurisdiction over this matter as provided for in Section XX of the Consent Decree.

"As a general rule, EPA prefers to achieve Enforcement First through settlement agreements (Administrative Orders on Consent (AOCs) or Consent Decrees (CDs)) rather than through UAOs."⁴⁵ The right to dispute resolution under an administrative order is a key consideration for most potentially responsible parties in deciding to cooperate with the government by signing a consent order:

AOCs also may offer benefits to the PRPs and EPA that are not available under a UAO. The Region should ensure that PRPs are aware of these potential benefits, including:

Beneficial Terms. The model AOC for RI/FS offers certain provisions that may be more beneficial to PRPs than the requirements typically included in a UAO for RI/FS. Most significantly, the model AOC for RI/FS includes a covenant by EPA not to sue and dispute resolution provisions that establish procedures for narrowing and resolving disputes.⁴⁶

During the negotiation of the Portland Harbor Consent Order, the terms of dispute resolution were so important that some parties ended up declining to sign the order after EPA refused to agree to dispute resolution terms it had accepted at other sites.⁴⁷ The history of negotiation of the FS process agreement further demonstrates the importance the LWG places on its dispute resolution rights under the AOC. By repudiating its contractual obligations to the LWG, EPA's actions will substantially discourage future settlements and voluntary cleanups.⁴⁸ Such an outcome would frustrate CERCLA's legislative purpose and betray the very interests that EPA is supposed to protect in administering the statute.

EPA's disavowal of the commitments it has made to the LWG in the Consent Order and the FS Process Agreement communicates to the larger Portland Harbor PRP community, as well as the LWG, that there is a significant risk that EPA will not stand behind its agreements. The LWG's long-held hope to implement a Portland Harbor remedy through settlement appears now a remote possibility. We urge EPA in the strongest possible terms to turn back from a course that seems destined to lead us all into years of litigation instead of cleanup.

⁴⁵ *Enforcement First at Superfund Sites: Negotiation and Enforcement Strategies for Remedial Investigation/Feasibility Studies (RI/FS)*, OSWER 9355.2-21 (August 9, 2005), p. 2. See also *Charter Int'l*, 83 F.3d at 520 (Congress sought in the SARA amendments "to encourage earlier resolutions by agreement.").

⁴⁶ *Id.* at p. 6.

⁴⁷ Ordine e-mail to Newlands dated July 27, 2001, attached at Tab 22.

⁴⁸ Cf. *Charter Int'l*, 83 F.3d at 518 n.11 (noting that because EPA is a "repeat player in the world of CERCLA clean-ups," developing "a reputation for cheating early settlers . . . would deter settlements in later clean-ups" and, "in the long run, hurt the government's interests."); *Akzo Coatings*, 30 F.3d at 774 (Easterbrook, J., concurring in part and dissenting in part) ("Having persuaded us to depart from the language of its settlement with *Aigner*, because formal agreements are just 'circumstances' to be weighed on some conceptual scale . . . , the EPA will have a hard time persuading other PRPs that its promises are credible – and a correspondingly hard time obtaining the maximum value in settlement").

Requested Relief

The LWG requests that EPA withdraw the January 4, 2016 letter.

As we have said, the LWG has no interest in delaying work at Portland Harbor. We continue to be open to considering adjustments to the process and schedule, so long as those adjustments neither presume that the LWG is in default under the Consent Order nor require the LWG to waive important contract rights, such as dispute resolution. As EPA moves toward remedy implementation, it is critical for EPA to demonstrate publicly that there are real benefits to PRPs in settling quickly with EPA, rather than forcing EPA to take enforcement action.

We have already spoken with Region 10 leadership about our intent to continue discussing ways we might resolve this matter during the 14 day informal dispute resolution period.

Based upon the discussions the LWG has had with EPA Region 10 to date, it appears that the Region has a settled view about how this dispute should be decided. In particular, the Region appears to be committed, at the highest level, to the view that EPA is justified in taking over the FS and that therefore the Consent Order does not allow for dispute of the final FS content. We note that EPA's website promotes EPA's Conflict Prevention and Resolution Center's (CPRC) Alternative Dispute Resolution (ADR) process as useful both in Superfund matters and in matters with broad implications for the community. EPA's Policy on Alternative Dispute Resolution states that EPA "strongly supports the use of alternative dispute resolution (ADR) to deal with disputes and potential conflicts."⁴⁹ The LWG suggests that if this dispute is not resolved during the informal dispute resolution period, the dispute should be referred to a neutral third party for resolution. Given the nature of the dispute and the importance of a successful resolution of these issues to both the selection of a remedy and the future implementation of that remedy, resolution through the CPRC ADR process by a third party not involved in the underlying decisions would have a greater potential to influence stakeholder acceptance of the outcome.

Sincerely,



The Lower Willamette Group

cc:

Lori Cora, U.S. Environmental Protection Agency, Region 10
Sean Sheldrake, U.S. Environmental Protection Agency, Region 10
Jim Woolford, U.S. Environmental Protection Agency, EPA Headquarters
Mathy Stanislaus, U.S. Environmental Protection Agency, EPA Headquarters
Stan Meiburg, U.S. Environmental Protection Agency, EPA Headquarters
Confederated Tribes and Bands of the Yakama Nation
Confederated Tribes of the Grand Ronde Community of Oregon
Confederated Tribes of Siletz Indians of Oregon

⁴⁹ 65 Fed. Reg. 81858, 81859 (December 27, 2000).

Confederated Tribes of the Umatilla Indian Reservation
Confederated Tribes of the Warm Springs Reservation of Oregon
Nez Perce Tribe
Oregon Department of Fish & Wildlife
United States Fish & Wildlife
Oregon Department of Environmental Quality
LWG Legal
LWG Repository

Attachment A
List of LWG Major Technical Issues Related to the Portland Harbor Feasibility Study

- 1) Incomplete evaluation of the alternatives and their effectiveness. The 2015 draft FS does not present technically supportable analyses to make a meaningful comparison among the set of alternatives. The individual and comparative analysis of alternatives in the 2015 draft FS is almost entirely qualitative, and most of the results and conclusions on the evaluation of the alternatives using the NCP criteria are unsupported and highly subjective. The lack of meaningful and reproducible metrics results in a qualitative and highly subjective comparison of the effectiveness of and differentiation among the alternatives. In particular, the absence of quantitative analysis for the long-term effectiveness evaluation, such as estimates on future sediment concentrations after construction completion, obviates the required long-term effectiveness and protectiveness evaluations. There is no basis in EPA's 2015 draft FS to state that the smaller alternatives will not achieve the same risk reduction as the larger alternatives absent any estimate of sediment concentrations or other quantitative assessment.

EPA's evaluation includes no attempt to quantify natural recovery. Although EPA acknowledges that natural recovery is occurring at Portland Harbor, EPA has discarded nearly all the empirical data and analyses presented in the Remedial Investigation Report, along with both the QEAfate model developed by the LWG for the 2012 draft FS. EPA's own efforts to quantify natural recovery using the SEDCAM model were dropped in favor of a qualitative estimate of the role of natural recovery in the long term effectiveness of the alternatives. This decision leaves EPA with only a one measure of performance for its alternatives: estimated sediment concentrations immediately following construction.

We feel that EPA's decision to abandon its efforts to quantify natural recovery is counter to the EPA Sediment Guidance which counsels:

"The time needed until protection is achieved can be difficult to assess at sediment sites, especially where bioaccumulative contaminants are present. Generally, for sites where risk is due to contaminants in the food chain, time to achieve protection can be estimated using models. These models may have significant uncertainty, but may be useful for predicting whether or not there are significant differences between times to achieve protection using different alternatives. When comparing time to achieve protection from MNR to that for active remedies such as capping and dredging, it is generally important to include the time for design and implementation of the active remedies in the analysis."¹

EPA's decision to abandon efforts to quantify natural recovery undermines the validity of the detailed analysis of alternatives in the FS:

- EPA is left with no real measure to demonstrate that the threshold criterion of protectiveness is met by any of its alternatives. EPA's "Summary of Comparative

¹ *Contaminated Sediment Remediation Guidance for Hazardous Waste Sites*. EPA Office of Solid Waste and Emergency Response. §2.4.1 OSWER 9355.0-85. December 2005.

Analysis of Alternatives” (Table 4.3-1), for example, states, for every alternative, “Time to achieve protectiveness through MNR is uncertain.”

- EPA is unable to compare the time to achieve RAOs and other short- and long-term effectiveness criteria in any more than the most general terms (For Alternative F, the “estimated time to achieve RAOs is uncertain, but less than for E”). These conclusions are not supported by the Conceptual Site Model as detailed in the attached Comment 13.
- The lack of any quantitative analysis of natural recovery precludes any meaningful evaluation of the cost effectiveness of the alternatives. For example, will the \$1.5 billion cost differential between Alternatives G and B get us to protectiveness 10 years sooner, 1 year sooner or ever?

- 2) EPA’s set of alternatives are not implementable as described in the FS. The FS fails to adequately consider critical implementation issues that will substantially increase the time, difficulty, and cost of conducting the cleanup. Many of EPA’s assumptions about production times, volumes and costs are inconsistent with experience at other sediment sites and do not appear to be physically possible in practice at Portland Harbor. To take just one example, EPA’s production calculations assume that dredging will proceed 24 hours per day, 6 days per week, during the entire four month in-water work window each year, for many years on end. EPA’s assumptions do not include any estimate of dredging efficiency (as was used in the Duwamish FS), including time necessary to reposition the dredge along its dredging lane, move barges receiving the dredged materials in and out of the work area, install and maintain water quality controls or perform water quality monitoring. EPA also briefly mentions but quickly dismisses the very probable objection of the community in nearby residential neighborhoods to light and noise pollution associated with long term 24 hour construction work. For these and other reasons, EPA’s production assumptions are demonstrably incapable of attainment in the real world, and result in a skewed comparison of alternatives re short- and long-term effectiveness and implementability.

The unrealistically optimistic production rates lead to significant underestimation of both construction time frames and potential remedy costs. Overly optimistic estimates about the time to complete construction undermine EPA’s assessment of the long- and short-term effectiveness of each alternative (longer time required to reach RAOs, longer short term risk due to higher fish tissue concentrations during construction, more quality of life disruption to the community, etc.) and compound in a way that could significantly change the conclusions about the benefits of more aggressive approaches (if EPA’s production rates are off by a factor of 2, Alternative B would take 8 years, rather than 4 years to complete, whereas Alternative G would be in construction for 36 years rather than 18). Similarly, underestimation of likely actual remedy costs precludes meaningful comparison of the cost effectiveness of EPA’s alternatives, as required by the NCP. As discussed above, this problem is compounded by the lack of any metric to consider the effects of natural recovery before, during, or following construction.

The extremely high costs for the five alternatives (ranging from \$1 billion to \$4 billion in current dollars) are not proportional to the overall effectiveness of these alternatives, and the alternatives are impracticable to implement. In comparison, the LWG identified a set of

alternatives that achieved substantial and similar risk reduction, were implementable, and cost-proportional to the alternatives' overall effectiveness. In the LWG's draft FS, the greatest degree of overall effectiveness was achieved by alternatives that ranged in cost from \$169 to \$398 million.

- 3) Significant divergence from how EPA has handled similar issues at other sediment sites. EPA prematurely and prescriptively applies a number of requirements increasing the cleanup costs by hundreds of millions of dollars while achieving no real risk reduction benefit at the Site. EPA's application of extremely low and unprecedented thresholds to identify "principal threat waste" means large quantities of material that EPA acknowledges can be reliably controlled through capping will be subject to costly in situ treatment that provides no actual additional risk reduction. Other "principal threat" materials removed from sediments or riverbanks must be treated prior to disposal in a permitted landfill, although EPA undertakes no analysis of whether treatment prior to landfilling has any risk benefit. Similarly, EPA's FS seems to indicate that dredged or excavated materials that are not hazardous wastes must nonetheless meet hazardous waste land disposal restrictions – and not merely the land disposal restrictions applicable to remediation waste, but those applicable to as-generated industrial hazardous wastes (most of which are, again, well below DEQ risk-based cleanup standards for soil). The significant burdens EPA's FS places on the management of remediation wastes have the potential to increase costs by hundreds of millions of dollars without any associated risk reduction.

Prescriptive assignment of treatment technologies across all alternatives is inconsistent with the NCP requirement to develop a range of alternatives requiring different degrees of treatment for source materials. 40 CFR 300.430(3)(i). It results in more aggressive remedial alternatives scoring higher for "reduction of toxicity" because of "treatment" without any quantitative or even qualitative evaluation of whether the reduction in toxicity is achieved by the treatment technology or simply by preventing exposure. Requiring unnecessary treatment of risks already controlled through capping or removal and offsite disposal certainly increases cost, but the absence of any alternatives that include less treatment preclude any evaluation of the cost effectiveness of treating these materials.

One real point of comparison is the McCormick & Baxter NPL site, the in-water portion of which is within the Portland Harbor site. EPA has concluded that the existing sediment cap at McCormick & Baxter "is protective of human health and the environment because the remedy required by the ROD has been implemented, and is working as intended."² The in-water remedy at the McCormick & Baxter site cost \$12 million.³ If the approach from EPA's FS were applied to McCormick & Baxter, construction costs would range between \$445 million and \$520 million⁴, largely because the contamination at McCormick & Baxter would qualify as "principal threat waste" per EPA's unprecedented definition of that concept.

- 4) Incorrect application of risk assessment results and absence of risk management. EPA's FS uses exposure areas that are different from those used in the risk assessments and focuses

² *Third Five-Year Review Report, McCormick & Baxter Creosoting Company Superfund Site* (EPA and DEQ, September 2011)

³ *Preliminary Close Out Report, McCormick & Baxter Creosoting Company Superfund Site* (EPA, September 2005)

⁴ Using EPA's methods as best we can reproduce them, this includes a contingency range from 20% to 40%, presented in 2015 current dollars, and not including long term operations, maintenance, and monitoring costs.

on reducing chemical concentrations rather than on managing the most important risks at the site. In addition, EPA's alternatives are evaluated solely against the highest risk estimates and most conservative risk scenarios identified in the baseline risk assessments in the absence of any application of risk management principles, and in ways that are themselves inconsistent with the risk assessments. The effectiveness of the alternatives at cleaning up PCBs, for example, is evaluated based upon a far more conservative assumption (1 river mile exposure area split longitudinally into three parts) than was used in the Baseline Human Health Risk Assessment (one whole river mile for smallmouth bass fish consumption). EPA's alternatives require large areas of total PAH cleanup, despite the fact that carcinogenic PAHs represent less than 1% of the cumulative risks to people who eat fish, and EPA has no technical basis to expect that cleaning up large areas of PAHs would have any meaningful impact (i.e., reduction) on overall fish consumption risk. Although EPA's approved Baseline Ecological Risk Assessment defined areas of benthic risk specific to the Site through a nuanced comprehensive benthic risk area approach that considered multiple lines of evidence, the FS completely abandons the comprehensive benthic approach in favor of generic screening level values, and then demerits all of its alternatives because they do not comprehensively address benthic risk.

EPA's decision to focus so intensely on contaminant mass reduction means that the FS includes no tools for EPA and other stakeholders to evaluate the magnitude of meaningful risk reduction achieved by the various alternatives against other important considerations. EPA's FS does not include information necessary for EPA to compare, rank, and prioritize risk and compare the cost effectiveness of cleanup options to reduce that risk.

- 5) Prescriptive technology assignments. EPA uses a prescriptive set of technology evaluation and scoring criteria to determine the technologies to be applied in each area of the Site. By assigning one technology to the same sediment areas in the technology screening step, the technology assignment prevents meaningful comparison of the performance of technologies and limits the evaluation of multiple technologies performing equally effectively. And because the technology assignment is based on an FS level of information, the prescriptive set of evaluation criteria will not appropriately or accurately predict the most appropriate technology assignments or configurations for Remedial Design (RD). Finally, this prescriptive approach does not accommodate flexibility for RD when additional information and analysis will be conducted.

These examples illustrate that simply modifying or correcting a few assumptions and calculations will not shore up the alternatives development and evaluation in EPA's FS. As a result, the LWG is concerned that EPA's FS does not currently present alternatives that are likely to be implemented by potentially responsible parties through settlement.

<p style="text-align: center;">TABLE OF CONTENTS January 19, 2015 Lower Willamette Group Request for Dispute Resolution Lower Willamette River, Portland Harbor Superfund Site USEPA Docket No: CERCLA-10-2001-0240</p>		
TAB #	Date	Document Title
1	April 2012	EPA Fact Sheet, Learn More About the Portland Harbor Superfund Site Cleanup
2	12/18/2012	EPA Letter from Chip Humphrey and Kristine Koch to Bob Wyatt, Lower Willamette Group Re: Portland Harbor Superfund Site, Administrative Order on Consent for Remedial Investigation and Feasibility Study: Docket No. CERCLA-10-2001-0240. EPA Comments on the Portland Harbor RI/FS Draft Feasibility Study (March 30, 2012), Attaching, FS Review Team Comments on Portland Harbor Draft Feasibility Study (March 2012)
3	1/1/2016	Declaration of James McKenna in Support of LWG's Request for Dispute Resolution, Attaching
4	9/24/2013	EPA Letter from Lori Cohen to Margaret Kirkpatrick, NW Natural
5	10/25/2012	EPA Memorandum, Subject: Formal Dispute on the EPA Notice of Non-Compliance and Directed Revisions to the Portland Harbor Draft Final Baseline Human Health Risk Assessment and Request for Dispute Resolution; Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study, USEPA Docket No. CERCLA-10-2001-0240 – Partial Resolution
6	9/30/2013	EPA Letter from Richard Albright to Bob Wyatt, Lower Willamette Group, Re: Combined Notice of Objection to and Request for Dispute Resolution of EPA's Notice of Demand for Payment of Stipulated Penalties Regarding Baseline Human Health Risk Assessment and Request for Determination; Lower Willamette River, Portland Harbor Superfund Site, USEPA Docket No: CERCLA-10-2001-0240
7	6/11/2014	Portland Harbor Superfund Site Revision Process for Feasibility Study June 11, 2014
8	12/17/2014	Portland Harbor Superfund Site Revision Process for Feasibility Study Modified December 15, 2014
9	4/7/2015	Email from Lori Cohen (EPA) to Margaret Kirkpatrick (NW Natural) Subject: Portland Harbor, containing "Message from Jim Woolford"
10	8/18/2015	Email from Kristine Koch to Bob Wyatt and Jim McKenna, Subject: Portland Harbor FS Section 4
11	06/05/2014	Email from Lori Cora (EPA) to Jennifer Woronets Subject: RE: FS process revision
12	11/26/2014	Email from Lori Cohen (EPA) to Margaret Kirkpatrick, Jessica Hamilton, et al. (LWG), Subject Portland Harbor – EPA proposals to Revise FS Process, Attaching K. Koch Redlines (word document included)
13	7/8/2014	EPA Letter from Kristine Koch to Bob Wyatt, Lower Willamette Group Re: Portland Harbor Superfund Site, Administrative Order on Consent for Remedial Investigation and Feasibility Study; Docket No. CERCLA-10-2001-0240. Modifications to the Feasibility Study Report (Section 1) dated March 30, 2012)
14	12/18/2014	Email from Kristine Koch to Bob Wyatt and Jim McKenna, Subject: Portland Harbor – Draft Final FS Section 1 and Appendix A

15	12/29/2015	Email from Deborah Robinson to Jen Woronets, Subject: Request for EPA/LWG conference call on Monday 1/4/15
16	1/4/2016	EPA Letter from Cami Grandinetti to Bob Wyatt, Lower Willamette Group Re: Portland Harbor Superfund Site, Administrative Order on Consent for Remedial Investigation and Feasibility Study; Docket No. CERCLA-10-2001-0240; EPA Decision to Complete the Portland Harbor Superfund Site Feasibility Study
17	6/30/2011	Options for Responding to Deficient Deliverables from PRPs
18	10/8/2015	FS Comments (documents combined under one tab) Email Subject: LWG Comments on EPA Draft FS Sections 3 and 4 with attachments: 2015_10_08 FS Section 3 and 4 Additional LWG Comments; 2015_10_08 FS Section 3 and 4 LWG Significant Issue Clarifications; LWG Comments on EPA FS Previously Submitted to EPA
19	9/8/2015	Significant Issues (documents combined under one tab) Email Subject: LWG List of Significant Issues with EPA's Revised Sections 3 and 4 with attachments: 2015-09-08 LWG Letter re Significant Issues on EPA FS Section 3 and 4; 2015-09-08 FS Sec 3 and 4 List of Significant Issues
20	10/19/2015	NRRB Comments (documents combined under one tab) Email Subject: LWG Recommended Approach to Portland Harbor Cleanup with attachment: 2015-10-19 LWG Recommended Approach to Portland Harbor Cleanup
21	9/12/2014	Parrett presentation, 2014 Oregon Environmental Cleanup Conference, September 12, 2014, Slide 17
22	7/27/2001	Email from Charles Ordine to Marcia Newlands dated July 27, 2001, Subject: draft redline AOC, attaching: july 25 PH AOC RL.doc